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Conditions of service of the judges of the International Criminal Court

Discussion paper by the Coordinator

Introduction

1. The Rome Statute refers to the remuneration and other conditions of service of the judges in its articles 35, 40 and 49. Thus, article 49 provides that the judges "shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties", and that "these salaries and allowances shall not be reduced during their terms of office". For its part, article 35 requires all elected judges *to be available to serve* as full-time members of the Court "from the commencement of their terms of office". The President and the First and Second Vice-Presidents "*shall serve*" on a full-time basis as soon as they are elected. The extent to which the remaining judges shall be required to serve on a full-time basis shall be decided by the Presidency, on the basis of the workload of the Court and in consultation with its members. Also relevant is article 40, which provides that those judges required to serve on a full-time basis at the seat of the Court "shall not engage in any other occupation of a professional nature", and further excludes all judges, full-time or not, from engaging in any activity "which is likely to interfere with their judicial functions or to affect confidence in their independence".

2. It may be concluded from the above that all judges, as soon as they are elected, should immediately render themselves "available to serve as full-time members of the Court", i.e. to ensure that, if necessary, they will be released in a timely fashion from their current professional occupation(s) in order to transfer to the seat of the Court. They shall not, however, be required to be so released unless and until they are actually called upon to serve on a full-time basis at the seat of the Court, either because they have been elected to the Presidency or because they have been required

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by the Presidency to serve on a full-time basis. In any event, from the moment they start serving on a full-time basis at the seat of the Court, they are required not to engage in any other occupation "of a professional nature".

3. It may further be concluded from articles 35 (4) and 49 that those judges who are initially not required to serve on a full-time basis are not entitled to full-time payments, but to "such [remuneration] as may be decided upon by the Assembly of States Parties".

4. It should also be pointed out that the Statute does not preclude a temporary reduction in the number of full-time judges. The number of judges shall never be reduced below 18 (art. 36, paras. 1 and 2 (c) (ii)); but the provision in article 35, paragraph 3, that the Presidency may decide from time to time "to what extent the remaining judges shall be required to serve on a full-time basis" would seem to apply to both eventualities, i.e. to an increase or a decrease in the number of full-time judges, as the Court's workload may require.

5. Also to be considered is the fact that *all* judges, whether full-time or not, are required to meet in plenary session at least once a year (Rules of Procedure and Evidence, rule 4.2) "to exercise their functions under the Statute, the Rules and the Regulations" and, if necessary, to meet also in special plenary sessions convened by the President *motu proprio* or at the request of one half of the judges. It should be recalled in this regard that the Statute envisages a considerable number of situations, other than the Inaugural Meeting itself, in which the intervention of the judges, as a whole, could be required.[1]

6. This statutory framework is somewhat sui generis in that it provides, at the same time, two different perspectives. The first is the long-term view of an established Court of 18 members, all of whom (or at least most of whom) are serving on a full-time basis. The second is that of a transitional period, the duration of which cannot be estimated at this time, whereby the Court will start to function with only three full-time members, while the remaining 15 will be taking up their functions progressively, as may be decided by the Presidency in the light of the workload of the Court, a workload which, as pointed out in paragraph 4, could perhaps dictate not only increases, but also reductions in the number of full-time judges. The conditions of service of the judges of the Court necessarily must be flexible enough to apply to all these possibilities.

7. At the outset, it seems reasonable to posit that the conditions of service of members of the Court needs to be considered in the light of relevant comparators. There appear to be two such comparator systems. One of them, exemplified by the International Court of Justice (ICJ), would seem to be better applicable to a court of full-time members; the other, of which the International Tribunal for the Law of the Sea (ITLOS) is an example, could better be adapted to a situation of variable workload. The present note attempts to describe the main features of both such systems. For the sake of brevity, the information will be highly summarized and will not contain what is believed to be, for the purpose of the note, non-essential information.

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[1] See for example (besides article 39 (1), articles 9 (2) (b), 41 (2) (c), 43 (4) and (5), 46 (2) (a) and (3), 48 (5) (a), 51 (2) (b) and (3), and 52 (1) and (3).

I. A system for full-time members of a Court

8. A recent report of the Secretary-General (A/C.5/56/14) provides useful information regarding conditions of service and compensation for the members of the ICJ, the judges of the International Tribunals for Yugoslavia (ICTY) and for Rwanda (ICTR) and ad litem judges of ICTY. The report also contains data on compensation received by officers of certain national judiciaries (in Australia, Canada, Japan, the United Kingdom of Great Britain and Northern Ireland and the United States of America); by officers of the Court of the European Communities, the European Court of Human Rights and the Iran-United States Claims Tribunal; by senior United Nations Secretariat officials; and by full-time members of United Nations subsidiary bodies. As the conditions of service of the judges of ICTR are determined by analogy with those of ICTY (article 12, paragraph 4, of the ICTR Statute) and those of ICTY are determined by analogy with the members of the ICJ (article 13 bis, paragraph 3, of the ICTY Statute), it would appear useful at the current stage to provide a summary of the conditions of service applicable to the latter.

9. Judges of the ICJ receive a net remuneration which, since 1 January 1999, has been maintained at US$ 160,000 per annum. In addition, the President receives a special allowance of $15,000 per annum, and the Vice-President, when acting as President, receives a special allowance of $94 per day, subject to a maximum of $9,400 per annum.

10. These figures, and indeed ICJ conditions of service as a whole, historically have been amended by the United Nations General Assembly on the basis of comprehensive reviews which lately have taken place every three years; thus, the last such review took place in 2001 and the next is scheduled for 2004. To assist it in determining the remuneration of ICJ judges, the General Assembly has been provided with data relating to other officials, both within and outside the judiciary (see para. 8 above); to the movements in the cost-of-living index at The Hague; and to the United States dollar/Netherlands guilder exchange rate. It is assumed that this last factor will not be relevant to the ICC, since the remuneration of ICC judges will be set in euros.

11. It should be pointed out at this point that "serving on a full-time basis at the seat of the Court" does not necessarily mean that full-time members are required to be actually resident of the city in which the Court is established. Specifically, the Statute of the ICJ requires only the President and the Registrar to reside in The Hague. This in turn is reflected in the calculation of those allowances which are paid on the basis of residency.

12. In addition to a net remuneration, ICJ judges:

(a) Receive assistance with education costs, under the same conditions as are applicable to United Nations staff members in the Professional and higher categories;

(b) May participate in United Nations health insurance plans, provided they pay the full applicable premium;

(c) Are reimbursed travel costs as called for by their residence status (see para. 22 below), and also removal of household effects if they choose to reside in The Hague;

(d) Are eligible, after five years of service, to receive a relocation allowance upon completion of their service.

13. In addition, ICJ judges are entitled to a pension benefit of which these are the salient factors:

(a) The pension scheme is non-contributory, i.e. pensions are a direct charge to the budget;

(b) A retirement pension equal to half the annual salary, at the time of retirement, is paid to a judge who has completed a full nine-year term;

(c) A proportional reduction is applied if the judge has not completed a nine-year term, but, for judges elected after 31 December 1998, no additional pension is paid if the judge has completed more than nine years of service;

(d) A surviving spouse receives 50 per cent of the late judge's pension; if he or she remarries, he or she will receive a final lump-sum benefit equal to twice the amount of the spouse's benefit;

(e) Pensions in payment are revised by the same percentage and at the same date as salary adjustments.

II. A system for non-full-time members of a Court

14. In regard to a judiciary composed to a large extent of non-full-time members, the remuneration system of the International Tribunal for the Law of the Sea is relevant. The ITLOS Statute contemplates a Tribunal which will not be permanently in session and which therefore necessitates a more differentiated system of remuneration. Thus, the remuneration system for ITLOS judges shows considerable differences from that of the ICJ judges. Only the President and the Registrar, as is the case in the ICJ, are required to reside at the seat of the Tribunal. Also as in the ICJ, the President receives a special annual allowance of $15,000, and the Vice-President a special allowance of $94 per day for each day on which he acts as President, subject to a cap of $9,400 per year.

15. For ITLOS judges other than the President, the annual remuneration is composed of three elements:

(a) An annual allowance, payable monthly, of one third of the annual remuneration paid to the only full-time member, i.e. one third of $160,000, or $53,333;

(b) A special allowance of $242.42 for each day that a judge is engaged on the business of the Tribunal;

(c) A subsistence allowance, currently set at $248, for each day that a judge attends meetings of the Tribunal at the seat of the Tribunal.

16. In addition, ITLOS judges are paid the special allowance, plus applicable subsistence, in respect of four weeks of organizational or administrative meetings each year divided into two sessions (spring and autumn), each of two weeks' duration. They may also be paid the special allowance for up to one week per annum of preparatory work.

17. Travel costs are paid as required for business-class airfare between the home country and the seat of the Tribunal by the most direct route.

18. Besides remuneration, ITLOS judges are entitled to a pension benefit which has been set up along the lines of that for ICJ judges, although adapted to ITLOS requirements (for example, the benefit is based on average remuneration, since the judges do not have a fixed income).

19. It should be noted that there are significant differences between the Statute of the ICC and that of ITLOS regarding incompatibility with other occupations. As regards the ICC, the situation is summarized in paragraph 1 of the present note. As for ITLOS, article 7 of the ITLOS Statute provides that no member of the Tribunal may exercise any political or administrative function, or associate actively with or be financially interested in any of the operations of enterprise concerned with resources of the sea or the seabed; nor can the judge act as agent, counsel or advocate in any case. Other than that, the ITLOS Statute places no limitation on the activities in which the judge may engage in addition to those undertaken as a judge. The ICC requirement of full availability from the commencement of the judge's term of office (Statute, art. 35 (1)) is not present in those terms in the ITLOS Statute although, in accordance with article 41.2 of the Rules of the Tribunal, "members shall hold themselves permanently available to exercise their functions".

III. Discussion and recommendations

20. The ICC will have 18 judges. Three of them, the President and the two Vice-Presidents, shall serve on a full-time basis as soon as they are elected. The remaining 15 must be available to serve on a full-time basis; but the actual moment of their assuming such full-time status is, at present, uncertain and unforeseeable. It is also theoretically possible for a judge, even after serving full-time, to revert to non-full-time status because of reduced workload in the Court In the light of these uncertainties, there would appear to be some advantage in establishing an initial system which could thereafter be modified, if necessary, in the light of experience. The main features of that system would be the following.

A. Full-time members of the Court

21. Taking into account the similarity in the conditions of service of the ICJ, ICTY, ICTR and, in respect of its President, also ITLOS, it would seem reasonable to apply a broadly similar system to full-time members of the ICC. This would entail payment of an annual remuneration to full-time judges which, were it to be in line with that paid to ICJ, ICTY and ICTR judges, and also to the President of ITLOS, would be of the order of €180,000. In addition, the President might be paid a special allowance of €18,000 (i.e. 10 per cent of the annual remuneration). The First and Second Vice-Presidents might, if acting as President, receive a special allowance of €100 per day.

22. Whereas the statutes of the ICJ and of ITLOS provide tha the President and the Registrar shall reside at the seat of the International Court (art. 22 (3)) or the Tribunal (art. 12 (3)), the Rome Statute contains no such explicit provision. True, the responsibilities which the Statute confers upon the Presidency (broadly

described in article 38 (3) (a) as "the proper administration of the Court, with the exception of the Office of the Prosecutor") would seem to require presence at the seat of the Court on a fairly permanent basis, but the details of that presence could possibly be arranged in consultation between the President and the two Vice-Presidents. In any event, the fact is that no such statutory obligation exists and that it must therefore be assumed that all judges, including those composing the Presidency, are free to choose their residence, provided that they are always available to serve as full-time members of the Court.

23. The consequence of choice of residence by a judge is reflected, in the ICJ, in the allowances, other than salary, received by the judges, and a similar system might be applied in the ICC. Thus, ICJ judges who maintain a residence outside The Hague are entitled, together with their eligible dependants, to the payment of a number of round trips per year between their place of residence and The Hague; no subsistence allowance, however, is paid while at The Hague. Conversely, judges residing at The Hague are entitled to an assignment grant upon taking up residence in The Hague, to removal of household effects, to financial assistance in connection with the education of their children, and to home leave once every two years. Residence at The Hague needs to be demonstrated through proof of property lease or ownership. The administration of the educational assistance is fairly complicated, and the option could be envisaged of converting it into a lump sum or even to take cognizance of it by including that lump sum in the net annual remuneration.

24. The Preparatory Commission may wish to decide whether to recommend to the Assembly of States Parties a remuneration system along the lines of that described in paragraphs 21 to 23 above. It may similarly wish to decide whether to recommend that the judges be covered by a pension system similar to that applicable to members of the ICJ.

B. E'ected judges who are not yet full-time members of the Court

25. Article 35 of the Rome Statute provides that *all* judges shall be elected as full-time members of the Court ano shall be available to serve on that basis from the commencement of their terms of office. It will be for the President to decide, on the basis of the workload of the Court and in consultation with its members, to what extent the judges, other than those composing the Presidency, shall be required to serve on a full-time basis. The financial arrangements for judges *not* required to serve on a full-time basis shall be made in accordance with article 49 of the Statute, i.e. they will be decided upon by the Assembly of States Parties.

26. In determining the remuneration of judges who are not called upon to serve on a full-time basis, the following considerations might apply. The requirement that all judges must be available to serve full-time from the commencement of their terms of office will in itself require a judge to take the necessary steps, vis-à-vis his or her other professional commitments, to be able to join the Court expeditiously, if so required. Furthermore, as prescribed in article 40, judges (including those not serving full-time) "shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence". This again will have the inevitable effect of narrowing down possible choices of professional activity for a judge not serving full-time. Again, also under article 40, once a judge is required to serve on a full-time basis at the seat of the Court, she or he "shall not

engage in any other occupation of a professional nature"; this may well affect the choice of such occupation or occupations while waiting to be called to serve on a full-time basis.[2]

27. The question therefore arises as to the level of compensation which, in respect of a non-full-time judge, will be likely to assist in enhancing her or his independence while at the same time providing some element of compensation in respect of "curtailed" professional opportunities and also ensuring continuous availability to serve on a full-time basis.

28. The only valid comparator which might be taken into account appears to be ITLOS: the level of compensation which has been considered as adequate for ITLOS judges, in relation to their availability to perform as such and also in regard to the incompatibilities defined in the ITLOS Statute, would appear to be justified in the light of the analogous, and in any case stricter, considerations applying to non-full-time ICC judges. Thus, the applicable level of compensation for non-full-time ICC judges might be one third of the compensation payable to a full-time judge, and, also as in ITLOS, an additional allowance could be paid for each day in which the judge participated in meetings of the Court, as may be required (see para. 5 and footnote 1).

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29. If the suggestions in the present note were found to be useful as an initial approach to the issue of conditions of service of ICC judges, a further note could be readied with more detailed suggestions and costings.

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[2] See also comments along this line by Rwelamira in Roy S. Lee (ed.), *The International Criminal Court: the making of the Rome Statute* (The Hague, Kluwer Law International, 1999), pp. 155-156.